92-1596

No.

Supreme Court U.S.
FILED
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THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

LIBERTY MORTGAGE COMPANY, a Delaware corporation,

Petitioner

vs.

ROBIN DALE FREY and CHERYL LYNN FREY,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM H. SULLIVAN, OBA #008761
3711 Classen Boulevard
Oklahoma City, Oklahoma 73118
(405) 521-0048
Attorney for Petitioner Liberty Mortgage Company

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QUESTION PRESENTED FOR REVIEW

Whether the Tenth Circuit Court of Appeals erred when it found that a home mortgage, protected by 11 U.S.C. § 1322(b)(2), can be bifurcated into secured and unsecured divisions based on the fair market value of the property, premised upon an interpretive application of 11 U.S.C. § 506(a) in a Chapter 13 bankruptcy action, leaving a previously secured creditor in the position of an undersecured creditor, notwithstanding this Court's opinion in **Dewsnup v. Timm**, 502 U.S. ___, 112 S.Ct. 733, 116 L.Ed.2d 903 (1992), that the same action in a Chapter 7 case was contrary to the congressional intent evidenced in the Bankruptcy Code?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES iii

OPINIONS and ORDERS. 2

JURISDICTIONAL STATEMENT 2

STATUTORY PROVISIONS AT ISSUE. 3

STATEMENT OF CASE. 5

ARGUMENT and AUTHORITIES 8

CONCLUSION 18

APPENDIX "A". A1

(Order of December 18, 1992 from the United States Court of Appeals for the Tenth Circuit)

APPENDIX "B". A3

(Order of April 24, 1991 from the United States District Court for the Western District of Oklahoma)

APPENDIX "C". A5

(Order of December 9, 1991 from the United States Bankruptcy Court for the Western District of Oklahoma)

TABLE OF AUTHORITIES

Cases

Braxton v. United States,
500 U.S. ____, 111 S.Ct. ___,
114 L.Ed.2d 385, 391 (1991) 7

Caminetti v. United States,
242 U.S. 470, 485,
37 S.Ct. 192, 61 L.Ed. 442 (1917). . . 14

Dewsnup v. Timm, 502 U.S. _____,
112 S.Ct. 733, 116 L.Ed.2d 903 (1992) . i
9, 11, 12, 13, 16, 18

Eastland Mortgage Co. v. Hart,
923 F.2d 1410 (10th Cir.1991) 7
14

Hougland v. Lomas & Nettleton, Co.,
886 F.2d 1182 (9th Cir.1989) 8

In re Chavez, 117 B.R. 733, 735
(Bankr.S.D.Fla.1990) 13

In re Hemsing, 75 B.R. 689
(Bankr.D.Mont., 1987). 8

In re Mahaner, 34 B.R. 308, 309
(Bankr.W.D.N.Y.1983) 13

In re Schum, 112 B.R. 159
(Bankr.N.D.Tex.1990) 8

Wilson v. Commonwealth Mortgage Corp.,
895 F.2d 123 (3rd Cir.1990). 8

RULES and STATUTES

Supreme Court Rule 10.1 (c) 3
8

11 U.S.C. § 47 7

11 U.S.C. § 506 (a). i
3, 9, 13

11 U.S.C. § 1322 (b)(2)(Supp.1990) . . . i
4, 9, 12, 13, 14, 15, 16, 17

11 U.S.C. § 1322 (b)(5)(Supp.1990) . . . 4
13

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THE SUPREME COURT OF THE UNITED STATES
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LIBERTY MORTGAGE COMPANY, a Delaware corporation,

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vs.

ROBIN DALE FREY and CHERYL LYNN FREY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Liberty Mortgage Company prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered December 18, 1992, which affirmed the order of the United States District Court for the Western District of Oklahoma.

OPINIONS AND ORDERS

The opinion of the Court of Appeals is not officially reported. It is reproduced as Appendix A, infra. On December 18, 1992, the Tenth Circuit Court of Appeals affirmed the decision of the lower court without opinion.

Judgment was entered in the District Court for Western Oklahoma on April 24, 1992, without opinion.

The order bifurcating the secured mortgage was entered by the Bankruptcy Court for the Western District of Oklahoma on December 9, 1991.

JURISDICTION

Petitioner, Liberty Mortgage Company, seeks review of the Tenth Circuit decision rendered on December 18, 1992. No petition for rehearing or extension to file for a writ of certiorari was filed in this case, thus the time to file began to

run on December 18, 1992. Jurisdiction in this case is requested pursuant to Supreme Court Rule 10.1 (c), which allows the Court to assume jurisdiction in a case where "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court."

STATUTORY PROVISIONS AT ISSUE

11 U.S.C. § 506 (a):

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such

allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 1322 (b)(2)(Supp.1990):

(b) subject to subsections (a) and (c) of this section, the plan may --

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

11 U.S.C. § 1322(b)(5)(Supp.1990):

(b) subject to subsections (a) and (c) of this section, the plan may --

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the

date on which the final payment under the plan is due;

STATEMENT OF THE CASE

Respondents in this action, Robin Dale and Cheryl Lynn Frey, obtained a purchase money mortgage on a house in Mustang, Oklahoma from Petitioner, Liberty Mortgage Company (hereinafter "Liberty"), in 1986. Respondents defaulted under the terms of the note and foreclosure proceedings were undertaken in the District Court of Canadian County, State of Oklahoma, Case No. CJ-91-165. Judgment was entered in favor of Liberty on June 28, 1991; however, Respondents filed a Chapter 13 Plan in the United States Bankruptcy Court for Western Oklahoma prior to Liberty's execution on the judgment.

At the same time the plan was filed, Respondents filed a "Debtor's Motion for

Order Determining Value of Secured Claims and Avoiding Liens" in which they requested the court to bifurcate Liberty's secured claim to a forty thousand dollar ($40,000.00) secured claim and a ten thousand, one hundred and fifty-three dollar and fifty-eight cent ($10,153.58) unsecured claim. The amounts were determined under the stipulation that the fair market value of the house at the time of the proceedings was forty thousand dollars ($40,000.00)[1]. Liberty filed its Proof of Claim in the amount of fifty thousand, one hundred fifty-three dollars and fifty-eight cents ($50,153.58)[2].

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[1]The stipulation arose through an ex parte order obtained by Respondents from Judge Lindsey establishing that the valuation of the property was forty thousand dollars ($40,000.00).

[2]A second Proof of Claim in the amount of five thousand, seven hundred eight dollars and thirty-two cents ($5,708.32) was filed in the case with respect to then

Although Liberty objected to the proposed "stripping" of its claim, the Honorable Paul B. Lindsey granted Respondents' request and confirmed the plan, bifurcating Liberty's claim. An appeal to the United States District Court for Western Oklahoma, the Honorable Ralph G. Thompson, was unsuccessful.

Pursuant to 11 U.S.C. § 47, Liberty appealed the decision of the district court to the Tenth Circuit Court of Appeals. The district court's decision was affirmed without opinion on the basis that the question presented was identical to that considered in **Eastland Mortgage Co. v. Hart**, 923 F.2d 1410 (10th Cir.1991). Liberty's present petition requests review of the Tenth Circuit's decision below.

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current arrearages, late fees and collection costs.

ARGUMENT AND AUTHORITIES

The question presented in the instant case, involving the analysis of certain provision of the United States Bankruptcy Code which involve the sanctity of secured claims on real property, has been the subject of much litigation (to differing results) in the various courts which have considered the issue. See **Wilson v. Commonwealth Mortgage Corp**, 895 F.2d 123 (3rd Cir.1990)(bifurcation allowed); **Hougland v. Lomas & Nettleton Co**, 886 F.2d 1182 ((9th Cir.1989)(bifurcation allowed); **In re Hemsing**, 75 B.R. 689 (Bankr. D.Mont., 1987)(bifurcation not allowed); **In re Schum**, 112 B.R. 159 (Bankr.N.D.Tex.1990)(bifurcation not allowed). The consideration of the bifurcation of a previously secured claim has engendered many different theories involving the interpretation (or non-

interpretation as it were) of the combined effect of Sections 506(a) and 1322(b)(2) on an undersecured claim. More importantly; however, this Court's recent decision in **Dewsnup v. Timm**, 502 U.S. ___, 112 S.Ct. 733, 116 L.Ed.2d 903 (1992), has crystallized the issues with respect to this practice in chapter 7 proceedings. This appeal seeks to logically extend the result reached in the **Dewsnup** case and make its protection equally applicable to creditors whose rights are affected by Chapter 13 plans.

In **Dewsnup**, this Court considered the effect of the language found in section 506 as applied under similar facts as those found in the present case. In that case, the debtor, Mrs. Dewsnup, filed a chapter 7 liquidation seeking relief from a lien which she and her husband had allowed to be taken on two parcels of Utah

farmland. At the time of the bankruptcy filing, the value of the property was far lower than the total amount of the debt secured by the lien. The district court reduced the secured portion of the undersecured creditor's claim (i.e., reduced the value of the creditor's lien) from the original one hundred and twenty thousand dollar ($120,000.00) to thirty-nine thousand dollars ($39,000.00), reflecting the market values of the property at that time.

This Court reversed the actions taken by all the lower courts and held that a fair reading of § 506 did not allow the "strip down" of the lien. The opinion recognizes the practical effect of such an allowance would be "to freeze the creditor's secured interest at the judicially determined valuation. By this approach that creditor would lose the

benefit of any increase in the value of the property by the time of the foreclosure sale. The increase would accrue to the benefit of the debtor, a result some of the parties describe as a 'windfall.'" **Id**. at ___, ___, 911.

Regardless of whether the prospect of a foreclosure exists, the lesson of **Dewsnup** must be here learned again-- to "freeze the creditor's secured interest" prevents the secured creditor from enjoying the benefit of increases in the value of the property at any time in the future, and hence the benefit of bargain with the debtor. The lower courts' logic in this case, notwithstanding that it is brought as a chapter 13 rather than a chapter 7 action, thereby presents a circumstance of "windfall" far more pervasive than that contemplated (and aptly presented) by **Dewsnup**. In this

situation, the mortgage holder is forever barred from obtaining the complete value of his bargain due to the diminished values paid to unsecured creditors, while the homeowner is left to enjoy his home (for which he ultimately paid less than agreed), retaining any subsequent increase in valuation at the time the property is ultimately sold. As presented below, Congress quite explicitly legislated against such a windfall with its chosen language of section 1322(b)(2).

The cornerstone of the **Dewsnup** decision was the recognition that "the creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee." **Id.** The Court held that in the history of bankruptcy proceedings "no provision of the pre-Code statute permitted involuntary reduction of

the amount of a creditor's lien for any reason other than payment on the debt." **Id**. at ___, ___, 912. There is no logical reason why the same reasoning which disallowed the stripping of the lien in **Dewsnup** would not apply to prevent such occurrence in an action where the primary difference in merely the section under which the "new start" is accomplished.

Resolution of the present problem entails an analysis and comparison of three different sections of the bankruptcy code; section 506(a), which applies in all bankruptcy matters, **In re Mahaner**, 34 B.R. 308, 309 (Bankr. W.D.N.Y.1983), and sections 1322(b)(2) and 1322(b)(5), which apply in cases brought under chapter 13. **In re Chavez**, 117 B.R. 733, 735 (Bankr. S.D.Fla. 1990). Examination of the application of these statutes should proceed based first on the specific

language of the sections. When the terms of a statute are clear from its language, no judicial interpretation is allowed, **Caminetti v. United States**, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

Although there was no opinion issued in the present case, the Tenth Circuit held that its previous opinion of **Eastland Mortgage Co. v. Hart**, 923 F.2d 1410 (10th Cir.1991), was dispositive of the same issue. The analysis from that case is clearly flawed.

In the **Hart** case, the Tenth Circuit allowed the bifurcation of a purchase money lien secured with real property on which the debtors had parked a mobile home. The diminution of the creditor's security interest was allowed notwithstanding the prohibition in section 1322(b)(2) against modification of "a claim secured only by a security interest

in real property which is the debtor's principal residence...[3]"

The court, rather than follow the plain language in section 1322(b)(2)with respect to a modification of a home mortgage, reasoned that section 506(a), which defines the term "secured claim" delineates the time of valuation of the lien apparently as the time of the filing, rather than at the time of making. Id. at 1413.

The effect of this interpretation is to cancel out for all practical purposes, the bargain into which the parties originally entered. All risk of loss is born by the lender rather than by the property owner. Certainly such a result

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[3]It is interesting to note that in the first reference to this particular code section in the opinion, the court chose to substitute ellipses for this portion of the section.

was not contemplated when this section was drafted. The conclusions reached by the Court in **Dewsnup** based on the historical underpinnings of bankruptcy laws reflect the rejection of such a strained interpretation.

Dewsnup presented for this Court, at a minimum, a formidable interpretive task. Similar interpretation is dispositive here; however, such an interpretive hurdle need never be confronted here. The lower courts have presented for this court a much more fundamental error than was identified in **Dewsnup**--the clear meaning and statutory mandate of section 1322(b)(2). Where **Dewsnup** rested on an analytical struggle between claim allowance pursuant to section 502 and the scope of lien avoidance pursuant to section 506(d), the present case is

resolved by a plain reading of section 1322(b)(2).

In **Braxton v. United States**, 500 U.S. ___, 111 S.Ct. ___, 114 L.Ed.2d 385,391 (1991), this Court held:

> A principal purpose for which we use our certiorari jurisdiction... is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law..... With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations. Ordinarily, however, we regard the task as initially and primarily ours.

In this case, the Court should exercise its discretion and grant certiorari for several reasons. First and foremost, is the fact that the opinion below does not

comport with the decision of this Court in **Dewsnup.** Second, conflict exists between the circuits which should be resolved. Finally, it is clear from the plain reading of the statutes in question that the decision by the Tenth Circuit Court of Appeal has significantly "departed from the accepted and usual course of judicial proceedings" that this Court should intervene in this matter. Rule 10.1, Rules of the Supreme Court.

CONCLUSION

Based on the foregoing argument, Petitioner, Liberty Mortgage Company, respectfully requests that this Court grant certiorari and review the merits of the issues presented by this case.

Respectfully Submitted,

WILLIAM H. SULLIVAN
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LIBERTY MORTGAGE COMPANY	)	
Appellant,	)	No. 92-6167
	)	(D.C. No. CIV-92249-T)
v.	)	(W.D. Oklahoma)
ROBIN DALE FREY,	)	
Appellee.	)	
ANN SPEARS, Trustee.	)	

ORDER AND JUDGMENT****

Before **MOORE, TACHA** and **BRORBY**, Circuit Judges.

After examining the brief and appellate record, this panel has determine unanimously that oral argument would not

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***This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.**

materially assist the determination of this appeal. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1.9. The cause if therefore ordered submitted without oral argument.

This bankruptcy appeal presents the identical issue already decided in Eastland Mortgage Co. v. Hart, 923 F.2d 1410 (10th Cir. 1991). We adhere to that decision and **AFFIRM.**

Entered for the Court

John P. Moore
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	
ROBIN DALE FREY and CHERYL LYNN FREY, husband and wife,	CIV-92-249-T Bankruptcy Appeal
Debtors.	
LIBERTY MORTGAGE COMPANY, a Delaware corporation,	
Appellant,	
vs.	BK No. 91-04633-LN Chapter 13
ROBIN DALE FREY and CHERYL LYNN FREY, husband and wife,	
Appellees.	

ORDER

Appellant Liberty Mortgage Company has appealed the bankruptcy court's decision bifurcation the mortgage debt owed appellant into secured and unsecured portions. Appellant's position is directly contrary to this court's decision

in In re: Moretti, No. CIV-90-224-T (W.D. Okla. June 26, 1990) which was affirmed by the Tenth Circuit Court of Appeals in an unpublished Order and Judgment dated March 1, 1991. Accord Hart v. Eastland Mortgage Co., 923 f.2D 1410 (10th Cir. 1991). According, the decision of the bankruptcy court is AFFIRMED.

IT IS SO ORDERED this 24th day of April, 1991.

Ralph G. Thompson
United States District
Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

In re:	)	
	)	
ROBIN DALE FREY,	)	No. 91-04633-LN
SS#: 442-70-2319	)	(Chapter 13)
CHERYL LYNN FREY,	)	
SS#: 448-76-8346	)	
	)	
Debtor.	)	

ORDER DETERMINING VALUE OF SECURED CLAIMS AND PROVIDING FOR LIEN AVOIDANCE

NOW on the 9th day of December, 1991, this matter comes on for hearing. The Debtors appear by their attorney, Kenneth C. McCoy, and Creditor, Liberty Mortgage Company, appears by its attorney, William H. Sullivan.

The Debtors herein filed a Motion for Order Determining Value of Secured Claims and Voiding Liens on the hereinafter named Creditor(s), in certain property owned by the Debtors. Notice of said Motion was given the Creditor(s) and Chapter 13

Trustee and a response has been served on the Debtors' attorney within the notice period.

The Court **FINDS** that the parties have entered into good faith negotiations and have stipulated and agreed that the value of said property is $40,200.00

IT IS THEREFORE ORDERED, pursuant to Bankruptcy Rule 3012, that the following described Debtors' property has the value set opposite its' description, to wit:

PROPERTY	VALUE

Real Property: Home and principal residence.

233 West Split Branch
Mustang, Oklahoma 73064

Lot 9, in Block 3, of Replat of the BRANCHES ADDITION to Mustang, Canadian County, Oklahoma

Fair Market Value $ 40,200.00

The Court **FINDS** that the Creditor, Liberty Mortgage Company, has filed an objection and brief in opposition to their

treatment by the Debtors under the Plan. The Court having heard arguments of counsel, having reviewed the brief and being fully advised in the premises **FINDS** Liberty Mortgage Company's objection is overruled.

2. **IT IS FURTHER ORDERED**, that the following named Creditor(s) shall have an allowed secured claim in the amount set opposite the names of each said Creditor, 11 U.S.C. Section 506(a), to-wit:

Name of Creditor	Amount of Allowed Secured Claim
LIBERTY MORTGAGE COMPANY	$ 40,200.00

3. **IT IS FURTHER ORDERED**, each of the above named Creditor(s) shall have an allowed unsecured claim to the extent that their claim is not an allowed secured claim. It is estimated that the following named Creditor(s) shall have an allowed

unsecured claim in the amount set opposite the name of each said Creditor(s), to-wit:

Name of Creditor	Estimated Amount of Allowed Unsecured Claim
LIBERTY MORTGAGE COMPANY	$ 9,953.58

IT IS FURTHER ORDERED, that to the extent that a lien of an above named Creditor secures a claim against the Debtors that is not an allowed secured claim, and upon payment by the Debtor of the amount of the allowed secured claim together with appropriate interest, such lien is void pursuant to 11 U.S.C. Section 506(d).

Dated: January 21, 1992.

PAUL B. LINDSEY,
United States Bankruptcy
Judge

CERTIFICATE OF MAILING

This is to certify that on the 18th 31st day of March, 1993, a true and correct copy of the above and foregoing Petition for Writ of Certiorari, was mailed to the following, with postage fully prepaid thereon.

Mr. Kenneth C. McCoy
Attorney at Law
5350 S. Western, Suite 104
Oklahoma City, Oklahoma 73109

Mr. Robert L. Hoecker
Court Clerk
Tenth Circuit Court of Appeals
C404 U.S. Courthouse
1929 Stout Street
Denver, Colorado 80294

_____